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No. 04-

IN THE

Supreme Court of the United States

TALMIDGE INTERNATIONAL, LTD., NEPTUNE SHIPMANAGEMENT SERVICES (PTE) LTD., AMERICAN EAGLE TANKERS, INC., LTD., AMERICAN EAGLE TANKERS AGENCIES, INC. AND THE BRITANNIA STEAMSHIP INSURANCE ASSOCIATION, LTD.,

Petitioners,

v.

VINOD KUMAR DAHIYA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In practical effect, the rulings in the courts below were that an act of the Louisiana legislature nullifies a treaty of the United States and that a district court remand order to that effect is immune from appellate review. What is therefore ultimately at stake in this case is whether Louisiana can in fact abrogate a treaty ratified by Congress and in so doing jeopardize the power of the United States to enforce the treaty in other countries. The court of appeals did not reach this issue, concluding against a strong dissent that it lacked jurisdiction and thus raising the following issues for this Court:

1. (a) Did the court of appeals depart from the rule established by this Court in *Thermtron Products, et al v. H. David Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976) and as a result erroneously rely on 28 U.S.C. § 1447(d), which provides that remand orders based on a perceived lack of subject matter jurisdiction are not appealable, even though the district court did not state its order was based on lack of jurisdiction and the underlying claim was patently within the district court's original jurisdiction?

(b) Was the ruling of the court of appeals in this respect in conflict with the holding of the Fourth Circuit in *Kolibash v. Committee on Legal Ethics of the West Virginia Bar*, 872 F. 2d 571 (4th Cir. 1989) in which a remand order based on state law public policy grounds, the same basis for the remand order in this case, was held to be reviewable on appeal?

(c) Did Congress intend for there to be two different jurisdictional standards for appellate review of cases arising under The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, one for cases originating in federal court and another for cases originating in state court?

2. How should a federal court of appeals reconcile the ostensibly conflicting rule of non-appealability of remand orders found in 28 U.S.C. § 1447(d) with the right of immediate appeal of orders denying arbitration found in the Convention?

3. Is the denial of a motion to compel arbitration in a dispute covered by the Convention appealable as a separable and collateral order under this Court's holding in *City of Waco v. United States Fidelity & Guaranty Company*, 293 U.S. 140, 55 S. Ct. 6, 79 L. Ed. 244 (1934)?

CORPORATE DISCLOSURE STATEMENT

The caption of this matter contains the name of all parties to the proceeding. In compliance with Rule 29.6 of the Rules of the Supreme Court, there are no non-party parent corporations or publicly traded companies that are required to be identified.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement	iii
Table of Contents	iv
Table of Cited Authorities	v
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	2
Relevant Provisions	2
Facts Material to the Questions Presented	5
Argument and Reasons for Granting the Petition	9
Conclusion	21

TABLE OF CITED AUTHORITIES

Page

Cases:

Beiser v. Weyler,
284 F.3d 665 (5th Cir. 2002) 13

M/S BREMEN v. Zapata Off-Shore Co.,
407 U.S. 1, 92 S. Ct. 1907,
32 L. Ed. 2d 513 (1972) 10, 20

City of Waco v. United States Fidelity & Guaranty Company,
293 U.S. 140, 55 S. Ct. 6,
79 L. Ed. 244 (1934) ..... ii, 18

Francisco v. M/T STOLT ACHIEVEMENT,
293 F.3d 270, 2002 A.M.C. 1529
(5th Cir. 2002) 6

In re Digicon Marine, Inc.,
966 F.2d 158 (5th Cir 1992) 12, 13

Kolibash v. Committee on Legal Ethics of the West Virginia Bar,
872 F.2d 571 (4th Cir. 1989) ..... i, 14, 15

Lejano v K.S. Bandak, et al.,
CA No. 00-2990 "F" dated May 27, 2004
(Not officially reported.) 7

Cited Authorities

Page

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) 20

Quackenbush v. Allstate Insurance Company, 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996) 20

Russell Corp. v. American Home Assurance Company, 264 F.3d 1040 (11th Cir., 201) 15

Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) 11

Thermtron Products, et al. v. H. David Hermansdorfer, 423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976) ..... i, 11, 14, 15, 18

Cited Authorities

Page

Statutes:

9 U.S.C. § 1, *et seq.* 6

9 U.S.C.A. § 16 .....2, 11, 17, 19

9 U.S.C. § 201 ..... 6, 9

9 U.S.C. § 203 16

9 U.S.C.A. § 205 .....3, 16, 17

9 U.S.C. § 208 .....6, 16, 17

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 20

28 U.S.C. § 1292 3

28 U.S.C. § 1447 ..... *passim*

Louisiana Revised Statutes 23:921 ..... 5, 6

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed May 18, 2004 ..... 1a

Appendix B — Order And Reasons Of The United States District Court For The Eastern District Of Louisiana Filed October 11, 2002 ..... 41a

Appendix C — Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing Filed July 27, 2004 ..... 47a

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OPINIONS BELOW

The District Court opinion is reported at 2002 WL 31962151, 2002 AMC 2429 (E. D. La. 2002). The Fifth Circuit panel opinion is reported at 371 F.3d 207 (5th Cir. 2004). The denial of the petition for rehearing *en banc* is reported at 380 F.3d 218 (5th Cir. 2004).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit filed its opinion May 18, 2004 and denied petitioners' petition for *en banc* rehearing on July 27, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

9 U.S.C.A. § 16 Appeals

(a) An appeal may be taken from –

(1) an order –

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title;

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order –

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C.A. § 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal

of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

28 U.S.C.A. § 1447. Procedure after removal generally

. . .

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Louisiana Revised Statutes 23:921

> (2) The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause or choice of law clause in an employee's contract of employment or collective bargaining agreement, or attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action.

FACTS MATERIAL TO THE QUESTIONS PRESENTED

Vinod Dahiya was a seaman and a citizen of India who was injured in November, 1999 on the high seas, outside of Louisiana waters, on a foreign flag and foreign-owned cargo vessel. Prior to joining the ship, Dahiya signed an employment contract or "Deed" which governed the terms of his employment. One of the provisions of the contract required that all disputes arising out of Dahiya's employment be referred to arbitration in either India or Singapore. Notwithstanding this requirement, Dahiya subsequently filed suit in Louisiana state court, asserting claims under the Jones Act and the general maritime law.

Petitioners removed the state court suit to the United States District Court for the Eastern District of Louisiana pursuant to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1]. Petitioners then moved the district court to compel arbitration and to stay, or, alternatively, dismiss the litigation. Dahiya subsequently filed a motion to remand on the basis, among other things, of a 1999 Louisiana statute which purports to invalidate forum selection clauses in any "foreign or domestic" contract of employment.[2]

The district court found that the arbitration clause at issue was nearly indistinguishable from one at issue in another Convention case, *Francisco v. M/T STOLT ACHIEVEMENT*[3] in which the Fifth Circuit affirmed an order compelling arbitration, but nonetheless concluded that the Convention did not apply because the arbitration agreement here contravened the public policy of the State of Louisiana as expressed in Louisiana Revised Statutes 23:921. The district court wrote:

> The forum selection clause in Dahiya's employment contract states that arbitration shall occur in either Singapore or India. While it is undisputed that both countries are signatories to

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1. The treaty appears in full following 9 U.S.C. § 201. It is occasionally described in the literature as the New York Convention, but here will be referred to as the "Convention". The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, is referred to as the "Act". The Act is incorporated into the Convention at 9 U.S.C. § 208.

2. *See* La. Revised Statutes 23:921(A) (2) at page 5, *supra*.

3. 293 F.3d 270, 2002 A.M.C. 1529 (5th Cir. 2002).

> the Convention, the forum selection clause is invalid because it contravenes Louisiana express public policy. Therefore, the employment contract does not provide for arbitration in the territory of a Convention signatory, and the Court finds that no arbitration agreement exists to justify removal under § 205.[4]

In the same order, the district court denied petitioners' motion to compel arbitration and granted plaintiff's motion to remand. It is important to note for the appellate jurisdiction issue now before this Court that the district court did *not* find that it lacked subject matter jurisdiction; in fact, the court never mentioned the term jurisdiction at all.[5] For the district court to find that it lacked subject matter jurisdiction would have been inconceivable since the underlying suit, involving as it did a maritime personal injury claim, so clearly falls within the court's original admiralty and maritime jurisdiction.

In any event, a timely notice of appeal was filed in the United States Court of Appeals for the Fifth Circuit. Petitioners moved the court of appeals to stay the remand order pending the outcome of the appeal. Dahiya moved to

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4. See district court opinion, R. Pet. App. 41a. In a subsequent and unrelated case, the district judge recanted this decision, saying that on further reflection he had concluded that his decision in this case was in error although he was without jurisdiction to correct it. *Lejano v K.S. Bandak, et al,* CA No. 00-2990 "F". *See* footnote 1 at pages 2-3 of district court's order and reasons dated May 27, 2004. (Not officially reported.)

5. In his submissions to the district court, Dahiya likewise did not argue that the district court lacked subject matter jurisdiction.

dismiss the appeal for lack of jurisdiction. Both motions were carried with the case. On May 18, 2004, the Fifth Circuit panel ruled 2-1, Judge DeMoss dissenting, that appellate jurisdiction was lacking on the basis of § 1447(d) and that the district court ruling was not separately appealable as a collateral order. On July 27, 2004, petitioners' petition for rehearing *en banc* was denied over the dissent of Judges DeMoss and Smith. This petition for certiorari followed.

After the federal court of appeals declined to act on petitioners' request for a stay of the remand order, petitioners requested on the basis of the Convention a stay of litigation pending arbitration in the Louisiana state court to which the case had been remanded. This request was denied by the state court and ultimately the case was tried on the merits. The state court trial judge, however, has yet to rule.

WHAT IS SOUGHT

Petitioners ask that the Court for the following reasons remand the case to the court of appeals for a ruling on the underlying substantive issue of whether an act of the Louisiana legislature can abrogate a treaty of the United States:

1. The district court's remand of the case does not fall within the scope of prohibited appeals defined by 28 U.S.C. § 1447(d) and this Court's ruling in *Thermtron Products, et al., v. H. David Hermansdorfer* in that the remand was not based on a perceived lack of subject matter jurisdiction, and indeed could not have been given that the allegations of the complaint and of the petition for removal

brought it clearly within the district court's original subject matter jurisdiction;

2. Even if the district court ruling is one as to which § 1447(d) would otherwise preclude appellate review, the conflicting provisions of the Convention should be given precedence as a matter of statutory construction; and

3. The district court order of remand and its denial of petitioners' motions to stay and to compel arbitration are appealable as separable and collateral orders within the scope of this Court's holding in *City of Waco v. United States Fidelity & Guaranty Company.*

ARGUMENT AND REASONS FOR GRANTING THE PETITION

The Convention was concluded in New York on June 10, 1958 and entered into force in the United States December 29, 1970. It has now been ratified by some 114 countries.[6] The ratifying nations include both of the two countries in which the arbitration in this case was to go forward, India and Singapore, the former being Dahiya's home country. In ratifying the treaty, both nations, as well as the United States for that matter, agreed on the basis of reciprocity to apply the Convention to enforce arbitral awards from another Contracting State.[7]

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6. *See* comments following 9 U.S.C. § 201.

7. *See* 9 U.S.C. § 201, footnotes 12 (India), 22b (Singapore) and 29 (United States).

Article XIV of the Convention is critical to the substantive issues underlying this appeal. It provides:

> A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

The posture of this case at present throws into question whether the United States is or would be entitled to avail itself of the Convention in either Singapore or India since the law of the case is that the Convention is not enforceable in this country if it conflicts with the law of an individual state, in this instance Louisiana.[8] Further, the law of the case at this juncture is that if the suit originates in Louisiana state court, is removed to federal court pursuant to the Convention but is then remanded, the federal court of appeals is powerless even to review the case notwithstanding the immediate appeal provisions of the Act and which are incorporated into the Convention.

If the case had originally been filed in federal court, there is no question but that a denial of a motion to compel

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8. The Convention provides that its enforcement may be refused in the country where enforcement is sought if enforcement would be, ". . .contrary to the public policy *of that country*." (emphasis added). There is no indication in the Convention or otherwise that this exception was intended to include and give deference to the public policy of an individual state of the United States, especially when the express public policy of the United States is categorically contrary. *See, e.g., M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972) in which the Court observed, "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."

arbitration would have been immediately appealable.[9] The ruling of the Fifth Circuit has thus created a dual path of appellate review depending solely on where the case is originally filed, contrary to this Court's instruction in *Southland Corp. v. Keating*.[10]

It is against this backdrop that each of the questions presented must be considered.

I.

The first question is whether the court of appeals incorrectly applied § 1447(d) to deny appellate review of the district court's remand order, contrary to this Court's holding in *Thermtron*.

While § 1447(d) of the removal statute prohibits in general the appellate review of district court remand orders, in *Thermtron* this Court limited the application of § 1447(d) to those remand orders issued under § 1447(c). It is now well settled that only remand orders based on a lack of subject matter jurisdiction are immune from appellate review.

The question, then, is whether the remand order was based on a lack of subject matter jurisdiction. It was not.

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9. *See* 9 U.S.C. § 16.

10. 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). "We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted."

The court of appeals characterized, or more accurately mischaracterized, the district court's remand order as having been based on a lack of subject matter jurisdiction even though the district court order said no such thing. In fact, the remand order did not even mention the word jurisdiction.[11] Moreover, in his Motion to Remand as well as in his Opposition to Petitioner's Motion to Compel Arbitration, Dahiya never once argued that the district court was without subject matter jurisdiction.

The reason that neither Dahiya nor the district court made mention of the supposed lack of subject matter jurisdiction is obvious. In his state court petition, Dahiya asserted claims under the Jones Act and the general maritime law, both of which are clearly within the federal district court's original subject matter jurisdiction. Because the action could have been brought in the federal court originally as a maritime action, the district court had subject matter jurisdiction.[12]

The case could also have been brought originally in federal court pursuant to the Convention since it involves an arbitration agreement to which the Convention applies. As the Fifth Circuit correctly noted in a prior Convention case:

> . . . Whenever an arbitration agreement falling under the Convention could conceivably affect the

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11. The Court of Appeals was apparently not without doubt on the issue because at page 5 of the Opinion, the majority wrote, "The district court *appears* to have concluded that it lacked subject matter jusrisdiction and to have remanded on that basis" (emphasis added).

12. Compare *In re Digicon Marine, Inc.*, 966 F.2d 158, 160 (5th Cir 1992).

> outcome of the plaintiff's case, the agreement "relates to" the plaintiff's suit. Thus, the district court will have jurisdiction under § 205 over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense. As long as the defendant's assertion is not completely absurd or impossible, it is at least conceivable that the arbitration clause will impact the disposition of the case. That is all that is required to meet the low bar of "relates to."[13]

Far from being a determination that it lacked jurisdiction, the district court's remand order was based solely on its conclusion as a matter of substantive law that a provision of Louisiana statutory law rendered the Convention inapplicable. This is precisely what the district court said it was doing; ". . . the forum selection clause is invalid because it convenes Louisiana express public policy. Therefore, the employment contract does not provide for arbitration in the territory of a Convention signatory and the Court finds that no arbitration agreement exists to justify removal under § 205."[14] Even if this language is interpreted to mean the district court concluded it was without removal jurisdiction, this is not tantamount to a finding it lacked subject matter jurisdiction which is the only relevant jurisdictional inquiry under § 1447(d).[15]

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13. *Beiser v. Weyler*, 284 F.3d 665 at 669 (5th Cir. 2002).

14. *See* district court Order and Reasons dated October 11, 2002 Pet. App. 46a.

15. *See In re Digicon Marine, supra*, 966 F.2d 158 at 160.

The district court remand order was actually a ruling on the merits insofar as it considered whether an anti-forum selection statute of the state of Louisiana could abrogate on pubic policy grounds an arbitration agreement that otherwise fell within the scope of the Convention. Because the remand order was based on the merits, not on a perceived lack of subject matter jurisdiction, *Thermtron* teaches that § 1447(d) does not bar appellate review.

The Fifth Circuit's holding to the contrary is not only in conflict with *Thermtron*, but also with the holding of the Fourth Circuit in *Kolibash v. The Committee on Legal Ethics of the West Virginia Bar.*[16] The question in both *Kolibash* and the case at bar is the extent to which *Thermtron* authorizes appellate review of remand orders based on the application of state law public policy considerations. In *Kolibash*, state court disciplinary proceedings were brought against two attorneys accused of ethical misconduct. The case was removed to federal court but the district court granted a motion to remand the action to the state system, holding that the licensing of professionals was basically a function of state law. In the ensuing appeal, the Fourth Circuit at the outset considered the plaintiff's contention that appellate review of the district court's remand order was precluded by § 1447(d). Rejecting this argument and finding that it had appellate jurisdiction, the court of appeals wrote:

> The remand order represented a discretionary decision by the district court not to hear a certain case on the grounds of public policy and is therefore reviewable on appeal. As the Supreme Court recognized in *Thermtron*, Congress did not

16. 872 F.2d 571 (4th Cir 1989).

> intend "to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute."[17]

The Fifth Circuit holding in this case is also in conflict with the Eleventh Circuit's holding in *Russell Corp. v. American Home Assurance Company* [18] where the district court remanded on the ground the citizenship unanimity requirement for removal had not been met but only after it first interpreted an insurance policy's service of suit clause. Because the district court's order was based on the threshold interpretation of a contract provision, the Eleventh Circuit found that the remand order did not fall within the prohibition of § 1447(d) and therefore was subject to appellate review. This is contrary to the result in this case where the district court remand order was also based on a substantive evaluation of issues that had nothing to do with subject matter jurisdiction and everything to do with the merits of the case.

This Court should resolve the issue at the heart of this conflict between the Circuits, especially in light of its impact in this case on the overarching issue of the treaty obligations of the United States.

Finally, the conclusion of the Fifth Circuit that the district court remanded the case for lack of jurisdiction flies in the

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17. *Kolibash v. The Committee on Legal Ethics of the West Virginia Bar, supra,* 872 F.2d 571, 573, quoting *Thermtron Products, Inc, the Hermansdorfer, supra,* 423 U.S. 336, 351, 96 S. Ct. 584, 593.

18. 264 F 3d 1040 (11th Cir, 2001).

face of the plain language of the Convention's enabling legislation. Section 203 of Title 9 provides that an action falling under the Convention shall be deemed to arise under the laws and treaties of the United States while § 205 provides that an action removed from state court, "shall be deemed to have been brought in the district court to which it is removed." That is to say that the district court had original subject matter jurisdiction over the removed case by virtue of the allegation in the removal petition that the underlying dispute was subject to an arbitration agreement subject to the Convention.[19] Taken together these provisions show that the district court's remand order was not, and could not possibly have been, based on a perceived lack of subject matter jurisdiction. Dismissal of the appeal on the basis of § 1447(d) was therefore error and of a type that undermines the international treaty obligations of the United States.

II.

The second question presented need be considered only if the first is decided adversely to petitioners and it is found that the remand order does in fact fall within the scope of § 1447(d). That is, how should a federal court of appeals reconcile the ostensibly conflicting provisions of § 1447(d) with those of the Convention and the Act authorizing immediate appeals from orders denying a stay of arbitration.

The conflict between the statute and the Convention is more apparent than real. The Federal Arbitration Act is

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19. This is because, unlike removal pursuant to the general removal statue, the grounds for removal of a Convention case do not have to appear on the face of the plaintiff's state court complaint but may be shown in the petition for removal. *See* 9 U.S.C. § 208.

incorporated into the Convention by 9 U.S.C. § 208. Section 16(a)(1)(c) of the Act expressly provides for an immediate appeal from an order denying an application to compel arbitration. The panel majority concluded that this right to an immediate appeal is overridden by the strictures of § 1447(d) because § 205 of the Convention provides that, ". . .the procedure for removal of causes otherwise provided by law shall apply." [20]

The panel majority failed to take notice, however, of the final sentence of § 205:

> For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Chapter 1 of the title is the Federal Arbitration Act – it includes the right of immediate appeal. When read together, then, these provisions of the Convention and the Act show Congress's intent that removed Convention cases be treated for appeal purposes just as though they had been brought in federal court originally. If this action had in fact been brought originally in federal court, § 16 of the Act makes clear that the district court's denial of petitioners' motion to compel arbitration would have been subject to immediate appellate review. This right of appellate review, vested in a treaty of

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20. The Fifth Circuit panel cited three cases from the Eight, Second and Seventh Circuits which the majority concluded supported their conclusions. While each of those cases is distinguishable, they show in any case that this is a recurring issue among the Circuits and one which this Court should therefore address in light of the implications of the case for the international treaty obligations of the United States.

the United States, should not be so tenuous as to be lost to petitioners simply because the case started out in state court.

In light of the international implications of the issue in this and other Convention cases, the Court should grant certiorari to resolve the question.

III.

The third and final question presented is whether the denial of petitioners' motion to compel arbitration, if not reviewable under *Thermtron*, is appealable as a collateral order pursuant to this court's holding in *City of Waco v. United States Fidelity & Guaranty Company*.[21]

In *City of Waco*, this Court found that an appellate court could review an order dismissing a cross-action that accompanied a remand for lack of diversity jurisdiction because, ". . . in logic and in fact the decree of dismissal preceded that of remand and was made by the district court while it had control of the cause."[22] In this case, the district court's conclusion on the merits that the Convention did not apply to the arbitration agreement by virtue of a Louisiana statute also preceded the remand order "in logic and in fact". That is clear because in order for the district court to have remanded an otherwise properly removed case falling within the scope of the Convention, it must first have necessarily considered the substance of Louisiana statutory law. It is the district court's analysis of this substantive issue that petitioners seek to have reviewed on appeal.

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21. 293 U.S. 140, 55 S. Ct. 6, 79 L. Ed. 244 (1934).

22. *City of Waco v. United States Fidelity & Guaranty Co.*, *supra*, 293 U.S. 140 at 143.

Given that the district court's ruling on the effect of the Louisiana statute on the petitioners' right to arbitrate preceded the order of remand in logic and in fact and is therefore not immunized from appellate review by § 1447(d), there remains only the question of whether there is a legal basis for an immediate appeal. There are two bases for an immediate appeal – the Federal Arbitration Act and the collateral order doctrine. Section 16 of the Act authorizes an immediate appeal from an order denying an application under the Convention to compel arbitration or refusing a stay of litigation involving a dispute subject to arbitration. This, of course, is precisely what the district court did in this case so it could hardly be more clear that Congress has spoken unequivocally on this issue.[23]

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23. The dissenting judge in the court of appeals concluded he could not rely on Section 16 to establish the appealability of the district court order because the district court had concluded the Convention did not apply. Although the dissent's subsequent evaluation of the collateral order doctrine led it to conclude the order was appealable nonetheless, it also noted with regard to Section 16 that,

> This Catch-22 problem cries out for immediate remedy from the Supreme Court in this case and, ultimately, from Congress for all comparable cases that are sure to follow. It seems entirely absurd – in light of the Supreme Court's and Congress's extremely clear intentions that arbitration properly subject to the Federal Arbitration Act . . . and the Convention be treated and interpreted favorably and that denials of arbitration properly subject to the FAA and the Convention be immediately appealable – (1) that a state could successfully legislate an end run to defeat preferred federal removal jurisdiction in cases where there can scarce be doubt that the arbitration agreement

(Cont'd)

The district court order is also separately reviewable under principles established in a line of decisions by this Court culminating in *Quackenbush v. Allstate Insurance Company.*[24] In that case, the issue was whether an abstention-based remand order (i.e., an order, like the one involved in this case, outside the scope of § 1447(c) and (d)) was appealable as a final order under 28 U.S.C. § 1291. Finding the issue was resolved by its prior decision in *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp*,[25] this Court held that a remand order was appealable as a final decision under § 1291 because it effectively put the litigants out of court.

Quackenbush controls disposition of this question and yields the only result consistent with the strong pro-arbitration Congressional policy embodied in the Act and the Convention and in a series of cases decided by this Court beginning with *M/S BREMEN v. Zapata Off-Shore Company, supra.*

(Cont'd)

> at issue falls under the auspices of the Convention and was validly invoked, and (2) that district courts could apply that state's law to ignore preemptive federal arbitration law.

See footnote 3 at Pet.App. 17a.

24. 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996).

25. 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

CONCLUSION

The Court should grant certiorari in this case because of the important international implications of the underlying federal issues and because the ruling of the court of appeals is contrary to precedent of this Court and in conflict with the rulings of other courts of appeals. As the case stands, an act of the Louisiana legislature has nullified a treaty of the United States and the district court order to that effect, though recanted by the judge who issued it, has been held immune from appellate review. Congress could not possibly have intended such a result, one which threatens the ability of the United States to enforce the treaty in other countries.

The Court should also grant certiorari in order to clarify for the lower courts the interplay between the immediate appeal provisions of the Convention and of the Act with the restrictions of 28 U.S.C. § 1447(d), particularly as the issue has arisen frequently and is likely to become even more prevalent with the continuing growth of international trade between countries signatory to the Convention.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 18, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-31068

VINOD KUMAR DAHIYA,

Plaintiff-Appellee,

versus

TALMIDGE INTERNATIONAL, LTD., NEPTUNE SHIPMANAGEMENT SERVICES (PTE) LTD., AMERICAN EAGLE TANKERS, INC., LTD., AMERICAN EAGLE TANKERS AGENCIES, INC., BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, LTD.,

Defendants-Appellants.

Before BARKSDALE, DeMOSS and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

Defendants-Appellants filed a motion for rehearing complaining of this court's order of dismissal entered March 11, 2004. After considering this motion for rehearing, which we treat as a petition for reconsideration, the motion is GRANTED, the previous order of dismissal is withdrawn, and the following opinion is entered in lieu thereof.

Appendix A

Plaintiff-Appellee Vinod Kumar Dahiya filed this maritime personal injury action in Louisiana state court against several Defendants-Appellants: his employer, Neptune Shipmanagement Services; the owner of the ship on which he was injured, Talmidge International; co-owners of the fleet to which the ship belongs, American Eagle Tankers and American Eagle Tankers Agencies; and the ship's insurer, Brittania Steam Ship Insurance Association. Appellants removed to federal court on the grounds that their dispute with Dahiya was subject to an arbitration agreement governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S.C.A. §§ 201-208 (West 1999 & Supp.2003). The district court remanded the case to state court for lack of subject matter jurisdiction and denied Appellants' motions to compel arbitration and to stay the proceedings. Because this remand deprives us of appellate jurisdiction to consider any part of the district court's order, we dismiss this appeal.

I.

In 1999, Dahiya and Neptune signed two documents—a "deed" and a "bond"—in New Delhi, India. Together, the documents provided that Dahiya would receive two years of training, then work for Neptune for two years. The deed included an arbitration clause providing that any dispute arising out of the deed would be subject to arbitration in Singapore or India.[1]

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1. The bond included a similar arbitration clause, but only the deed's arbitration clause is at issue in this case because the dispute arose during Dahiya's training.

Appendix A

As part of his training, Dahiya worked on the M/T EAGLE AUSTIN, a vessel owned by Talmidge. Dahiya suffered burns while operating the vessel's incinerator and was later evacuated to a Louisiana hospital, where he received treatment.

Dahiya returned to India, but he sued Neptune, Talmidge, and the three other Appellants in Louisiana state court. Dahiya's suit, brought under the Savings to Suitors Clause, 28 U.S.C.A. § 1333(1) (West 1993), alleged that Appellants had breached obligations under the Jones Act, 46 U.S.C.A. app. § 688 (West 2003), general maritime law, and other applicable law.

Appellants invoked federal jurisdiction as a federal question, *see* 28 U.S.C.A. § 1441(b) (West 1994), and under § 205 of the Convention, 9 U.S.C.A. § 205 (West 1999),[2] and removed to federal court. Appellants filed their removal petition more than thirty days after receiving notice of Dahiya's suit. Generally, such a delay would preclude removal. *See* 28 U.S.C.A. § 1446(b) (West 1994). Section 205, however, allows removal at any time prior to trial, and Dahiya does not dispute that Appellants filed their petition before trial.

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2. Section 205 provides that "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending."

Once in federal court, Appellants moved to compel arbitration and to stay the proceedings or, in the alternative, to dismiss Dahiya's suit. Dahiya moved to remand. Dahiya argued that the deed's terms did not qualify as an arbitration agreement under the Convention and therefore could not support removal under § 205.

The district court sided with Dahiya and, in a single order, remanded the case to state court and denied Appellants' motions to stay proceedings and to compel arbitration. The court began its order by assessing the validity of what it called the "forum selection clause"—i.e., the arbitration clause in the deed between Dahiya and Neptune. The court held that this clause was invalid because forum selection clauses contravene Louisiana public policy. The court then turned directly to the question of its jurisdiction. The court began by noting that because Appellants failed to remove within thirty days, federal jurisdiction hinged entirely on § 205. With respect to jurisdiction under § 205, the court reasoned that because the deed contained no valid forum selection clause, the parties had not entered an agreement to arbitrate valid under the Convention. The court therefore concluded that it had no jurisdiction under § 205, remanded the case, and denied Appellants' pending motions.

Appellants sought review of the district court's order and moved for a stay of the the ongoing state court proceedings. Dahiya moved to dismiss for lack of appellate jurisdiction. Both motions have been carried with the case.[3]

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3. While this appeal was pending, Dahiya's state court suit proceeded. Even before we heard oral arguments, a Louisiana trial

(Cont'd)

II.

Our analysis begins and ends with Dahiya's motion to dismiss, for in the absence of appellate jurisdiction, we have no authority to review the district court's order.

We cannot review the remand itself. After a district court remands a case to state court for lack of subject matter jurisdiction, 28 U.S.C. § 1447(d) bars a federal appellate court from reviewing the remand ruling "no matter how erroneous." *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 775 (5th Cir.2001); *see* 28 U.S.C.A. § 1447(c), (d) (West 1994). The district court appears to have concluded that it lacked subject matter jurisdiction and to have remanded on that basis. Thus, under § 1447(d), we cannot review the remand.

(Cont'd)
court overruled Appellants' exceptions regarding arbitration and jurisdiction. Subsequently, Appellants unsuccessfully sought supervisory writs from the Louisiana Court of Appeals and the Louisiana Supreme Court.

Based on the denial of these writs, Dahiya filed in this Court a motion to dismiss for res judicata. Dahiya claimed that the Louisiana trial court rulings and the denial of supervisory writs constituted final judgments and precluded Appellants from seeking a motion compelling arbitration from this Court. Appellants failed to respond in time, and we dismissed the appeal. Appellants promptly filed a motion for panel rehearing, which we treated as a motion for panel reconsideration. Because we have granted that motion, we now turn to the other issues in this case.

Appendix A

That Appellants removed under § 205 of the Convention does not vest us with jurisdiction despite § 1447(d). In cases removed under § 205, "[t]he procedure for removal of causes otherwise provided by law shall apply." 9 U.S.C.A. § 205. This "procedure for removal" includes the strictures of § 1447(d). *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London,* 119 F.3d 619, 624-625 (8th Cir.1997); *LaFarge Coppee v. Venezolana De Cementos, S.A.C.A.,* 31 F.3d 70, 71-72 (2d Cir.1994); *In re Amoco Petroleum Additives Co.,* 964 F.3d 706, 712-13 (7th Cir.1992). Thus, when a case removed under § 205 is subsequently remanded for lack of subject matter jurisdiction, an appellate court cannot review the order of remand.

Appellants contend that, regardless of whether we can review the remand itself, we have jurisdiction to review the district court's denial of arbitration and denial of stay under 9 U.S.C. § 16, which provides that appeals may be taken from orders refusing stays or denying motions to compel arbitration, *see* 9 U.S.C.A. § 16(a)(1)(A),(C) (West 1999).[4] We lack jurisdiction under § 16 because the denials of Appellants' motions to stay and to compel arbitration accompanied a remand for lack of subject matter jurisdiction. *See Transit Cas.,* 119 F.3d at 623-625. Any order remanding for lack of subject matter jurisdiction necessarily denies all other pending motions, for "[u]nless a federal court possesses subject matter jurisdiction over a dispute, . . . any order it makes (other than an order of dismissal or remand) is void." *John G. & Marie Stella Kenedy Mem'l Found. v. Mauro,*

4. Section 16 is not a part of the Convention, but its provisions are applicable to cases brought under the Convention. *See* 9 U.S.C.A. § 208 (West Supp.2003).

21 F.3d 667, 674 (5th Cir.1994) (quoting *Shirley v. Maxicare Tex., Inc.,* 921 F.2d 565, 568 (5th Cir.1991)). Motions to stay proceedings and to compel arbitration will be common if not universal in cases removed under § 205. Thus, in the vast majority of cases removed under § 205, an order of remand will be the effective equivalent of a denial of motions to stay proceedings and to compel arbitration. Recognizing appellate review of such remand orders under § 16 would circumvent § 1447(d) by affording review of remand orders issued in nearly every case removed under § 205. Section 205, by expressly invoking "[t]he procedure for removal of causes otherwise provided by law," forecloses such a result.

District court determinations accompanying an order of remand are reviewable in spite of § 1447(d) if they meet the requirements first outlined in *City of Waco, Texas v. United States Fidelity & Guaranty Co.,* 293 U.S. 140 (1934). Under *Waco,* a federal appeals court can review a pre-remand decision made by a district court if that decision is "separable" from the remand order and independently reviewable through a mechanism such as the collateral order doctrine. *Heaton v. Monogram Credit Card Bank,* 297 F.3d 416, 421 (5th Cir.2002). To be separable, the decision must meet two criteria. First, the decision must have preceded the remand order "in logic and in fact" such that the decision was "made by the [d]istrict [c]ourt while it had control of the cause." *Waco,* 293 U.S. at 143. Second, the decision must be "conclusive," i.e., "functionally unreviewable in state courts." *Arnold,* 277 F.3d at 776.

The district court's refusal to compel arbitration and to stay proceedings is not reviewable under *Waco* because that

refusal was not conclusive. Our precedent "has defined conclusiveness in terms of whether the order was 'substantive' or 'jurisdictional': if a decision is simply jurisdictional it is not conclusive." *Doleac ex rel. Doleac v. Michalson,* 264 F.3d 470, 486 (5th Cir.2001). Thus, in *Soley v. First National Bank of Commerce,* 923 F.2d 406, 410 (5th Cir.1991), we considered whether we could review a pre-remand ruling on ERISA preemption and concluded that "because we interpret[ed] the remand order as jurisdictional, the state court [would] have an opportunity to consider the appellants' preemption defense and the district court's order [would] have no preclusive effect." Likewise, in *Linton v. Airbus Industrie,* 30 F.3d 592, 597 (5th Cir.1994), we considered whether we could review a district court's pre-remand rulings on foreign sovereign immunity and held that "[i]n light of the district court's ultimate conclusion that the entire case had to be remanded for lack of subject matter jurisdiction, the district court's [foreign sovereign immunity] determination [could] be deemed a jurisdictional finding under the facts of this case and, as such, [could] be reviewed by the state court upon remand." Most recently, in *Angelides v. Baylor College of Medicine,* 117 F.3d 833, 837 (5th Cir.1997), we explained that a district court's pre-remand immunity and exhaustion determinations "were not 'conclusive' because, as jurisdictional decisions, they [could] be reviewed in the state court." In sum, when a district court makes a determination in the process of remanding a case for lack of jurisdiction, that determination is jurisdictional and can be revisited by a state court upon remand.

In this case, the district court determined that the arbitration clause was invalid in the process of ascertaining

whether it had subject matter jurisdiction. Under *Soley, Linton*, or *Angelides,* that determination is jurisdictional and therefore has no preclusive effect in state court. Thus, because the district court's refusals to compel arbitration and to stay proceedings were not conclusive, those refusals are not reviewable under *Waco.*

In their efforts to circumvent § 1447(d), Appellants rely on *Beiser v. Weyler,* 284 F.3d 665 (5th Cir.2002). *Beiser* does not control this case. In *Beiser,* as in this case, defendants removed to federal court under § 205. *Id.* at 666-67. The district court in *Beiser,* however, determined that it had jurisdiction and *denied* the plaintiff's motion to remand. *Id.* at 667. Thus, in *Beiser* we did not confront the bar to appellate jurisdiction established in § 1447(d), which inheres only after remand.[5]

Appellants insist, and we recognize, that the argument for remand advanced by Dahiya and accepted in the district court closely resembles the argument for remand we disapproved in *Beiser.*[6] If we could review that argument,

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5. In *Beiser,* we speculated in dicta about what would have happened had the district court remanded the case. *Id.* at 672-74. We recognized that § 1447(d) would have deprived us of appellate jurisdiction and led to the unappealing result of having state courts handle questions of federal arbitration law. *Id.*

6. In *Beiser,* the plaintiff argued that the district court should have remanded because his case did not "relate to" the arbitration agreement on which defendants relied. *Id.* at 668. We rejected the plaintiff's theory as inconsistent with the plain language of § 205 and the federal policy favoring arbitration. *Id.* at 668-74. In particular,

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we might reject it for many of the reasons outlined in *Beiser.* Section 1447(d), however, forecloses appellate review even of egregiously mistaken district court remands. *See Arnold,* 277 F.3d at 775.

III.

Because we lack appellate jurisdiction to review any facet of the district court's order, we cannot address the district court's discussion of international arbitration law. We therefore GRANT Dahiya's motion to dismiss this appeal and DENY as moot Appellants' motion to stay proceedings pending arbitration.

DISMISSED.

(Cont'd)
we advised district courts against conflating a jurisdictional analysis with an evaluation of the merits of a defendant's motion to compel arbitration. *Id.* at 670-72.

Appendix A

DeMOSS, Circuit Judge, dissenting:

I agree with the majority that if the district court's remand determination was based on a lack of removal jurisdiction, 28 U.S.C. § 1447(d) likely precludes us from reviewing the remand order itself.[1] However, I respectfully disagree with

1. I would like to point out that while the separate removability provision under 9 U.S.C. § 205 of the Convention Treaty (the "Convention"), enabled at 9 U.S.C. § 201 *et seq.*, states "the procedure for removal of causes otherwise provided by law shall apply," it also explicitly relaxes certain requirements under 28 U.S.C. § 1446. That is, removals under the Convention are not subject to the 30-day and one-year time limitations and can occur "at any time before the trial," and the ground for removal (here, the arbitration provision in an international agreement) does not have to appear on the face of the plaintiff's state court complaint "but may be shown in the petition for removal." 9 U.S.C.A. § 205 (West 2004).

Furthermore, the terms of 9 U.S.C. § 16(a)(1)(C) (which is made applicable to the Convention by 9 U.S.C. § 208) expressly provide for an appeal from an order "denying an application under section 206 of this title to compel arbitration," which immediate appealability is unique to denials of arbitration under the Convention. 9 U.S.C.A. § 16(a)(1)(C) (West 2004). The language of § 203 expressly states that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States," 9 U.S.C.A. § 203 (West 2004), and under § 205 an action removed from state court "shall be deemed to have been brought in the district court to which it is removed." ***Id.*** § 205. These distinctions suggest a fundamental difference between removal of a case under 28 U.S.C. § 1441 *et seq.* and removal of a case under 9 U.S.C. § 205. Under §§ 1441-1446, the purpose is to change the forum in which the same case will be tried as would have been tried in the state court; whereas,

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the majority's dismissal for lack of jurisdiction and would conclude that we have appellate jurisdiction over the order denying arbitration and that the district court erred in refusing to order arbitration under the Convention Treaty (the "Convention"), 9 U.S.C. § 201 *et seq.*

I. *This Court can review the district court's denial of the motion to compel arbitration and stay proceedings.*

I firmly believe that an order denying arbitration, such as the district court entered here, is reviewable as a separable

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(Cont'd)
under § 205, the purpose is to allow the removing party to assert in federal court the existence of an agreement to arbitrate under the Convention and compel such arbitration in lieu of the trial that would otherwise occur in the state court.

Thus, in a typical removal under § 1441 *et seq.*, the nonappealability of a remand order is a reflection of the congressional policy to prevent delays of the trial on the merits by appeals over the validity of the remand order. But removal under § 205 raises the issue of whether there should be a trial on the merits at all; and the immediate appeals process authorized under 9 U.S.C. § 16 reflects the strong congressional policy of giving preference to arbitration over litigation as to agreements covered by the Convention. It seems that Congress intended to treat removals under the Convention differently and more leniently than removals under the general removal statutes. There may be an argument that the language of the Convention should control, rather than § 1447(d), when dealing with an agreement to arbitrate under the Convention. However, no case purports to resolve this apparent conflict between 28 U.S.C. § 1447(d) and 9 U.S.C. § 16; so I do not conclude here that the remand order itself is reviewable under § 16.

and collateral order. *See* ***Doleac ex rel. Doleac v. Michalson,*** 264 F.3d 470, 478 (5th Cir.2001). There are two distinct steps in the consideration: (1) whether the order is separable from the remand to overcome the bar of § 1447(d); and (2) whether the order is appealable under 28 U.S.C. § 1291 or otherwise. *Id.* at 478-79, 485. The order denying arbitration here meets both requirements.

A. ***Separability of the denial of arbitration.***

In ***City of Waco v. United States Fidelity & Guaranty Co.,*** 293 U.S. 140 (1934), the Supreme Court found the appellate court could review an order dismissing a cross-action that accompanied a remand for lack of diversity jurisdiction because it "in logic and in fact . . . preceded that of remand and was made by the District Court while it had control of the cause." ***Id.*** at 143. To be found separable, the order also must be conclusive, in that it has the "preclusive effect of being functionally unreviewable in the state court." ***Doleac,*** 264 F.3d at 482 (quoting ***Angelides v. Baylor Coll. of Med.,*** 117 F.3d 833, 837 (5th Cir.1997)).

In the district court's single order, the determination that no agreement to arbitrate existed did precede the remand order "in logic." Naturally, without a valid arbitration agreement in play, any motion to compel arbitration would have to be denied. Here, the finding that no valid arbitration agreement existed under Louisiana policy and law also provided the basis "in logic" to consider remand; it served as the "impetus for remanding the case." ***Doleac,*** 264 F.3d at 483 (quoting ***Tillman v. CSX Transp., Inc.,*** 929 F.2d 1023, 1026 (5th Cir.1991)).

Likewise, although the denial of arbitration and the remand stemmed from the same physical order, the arbitration determination also preceded the remand "in fact." It would have had to, because the opposite sequence of events (remand, then denial of arbitration) would have meant the district court rendered a meaningless denial of arbitration because at that point of remand jurisdiction would have already passed to the state court. Also, the "in fact" inquiry considers if:

> [T]he issue has independent relevance in adjudging the rights of the parties (i.e., relevance beyond determining the existence of federal subject matter jurisdiction), the decision is separable and falls within the reasoning of *City of Waco*—even if it also happens to have an incidental effect on the court's jurisdiction.

Doleac, 264 F.3d at 486 (quoting Powers v. Southland Corp., 4 F.3d 223, 228 (3d Cir.1993)). Here, the district court determined whether the arbitration clause in Dahiya's deed was valid under Louisiana law. While this determination did affect jurisdiction in that an invalid arbitration clause meant there could be no arbitration agreement under the Convention for proper removal under § 205, it also had powerful "relevance beyond determining [] jurisdiction." It cut Appellants off from their right to have their dispute with Dahiya settled by an arbitrator, outside the courtroom.

After considering whether the order is separable "in logic" and "in fact," this Court must determine whether the order is conclusive, that is, functionally unreviewable in

the state court. ***Doleac,*** 264 F.3d at 482. "[O]ur court has defined conclusiveness in terms of whether the order was 'substantive' or 'jurisdictional': if a decision is simply jurisdictional, it is not conclusive." ***Id.*** at 486. However, a "substantive" decision will have a preclusive effect in the state court. ***Id.*** at 487. Dahiya argues, in essence, that the district court's finding on the issue of arbitration is just jurisdictional because it can have no preclusive collateral estoppel effect on the state court. The doctrine of collateral estoppel has three requirements: (1) the prior federal decision resulted in a "judgment on the merits"; (2) the same fact issue must have been "actually litigated" in the federal court; and (3) the disposition of that issue must have been "necessary to the outcome" of the prior federal litigation. ***Falcon v. Transportes Aeros de Coahuila, S.A.,*** 169 F.3d 309, 312 (5th Cir.1999) (quoting ***Parklane Hosiery Co., Inc. v. Shore,*** 439 U.S. 322, 326 n.5 (1979)).

Usually, a determination that a court lacks jurisdiction is not considered a judgment on the merits for collateral estoppel to apply. *See* ***Nilsen v. City of Moss Point, Miss.,*** 701 F.2d 556, 562 (5th Cir.1983) (en banc). But legal findings that serve as prerequisites to and are thus necessary to make a lack of jurisdiction decision can have a collateral estoppel effect in state court. *See* ***Falcon,*** 169 F.3d at 312-13.

Here, a finding that no valid arbitration agreement existed equated precisely to a "judgment on the merits" of the efficacy of such arbitration clause and shut off any arbitration proceedings brought by Appellants. Unlike in ***Doleac*** where the amendment allowing joinder merely changed the court in which the same claims would be litigated, 264 F.3d at

487-88, the denial of arbitration here closed the "non-court" forum off entirely from Appellants.[2]

As for the arbitration issue having been "actually litigated" and "necessary to the outcome," we indicated in *Falcon* that when a federal district court determines it does not have subject matter jurisdiction, findings necessary to make that decision have collateral estoppel consequences in a state court. 169 F.3d at 312-13 (citation omitted). Thus, here, because the district court's determination that no arbitration agreement existed was a legal finding "necessary" to its decision that it did not have § 205 removal jurisdiction, Dahiya could attempt to preclude Appellants' defense of arbitration by raising collateral estoppel in the state court.

B. ***Appealability of the denial of arbitration.***

Having found the arbitration determination separable, the second step under *Doleac* is that the separable ruling must also be appealable as a final decision under 28 U.S.C. § 1291 or under an exception to finality. 264 F.3d at 489. A denial of a motion to compel arbitration is not a final decision per § 1291. *See* ***Quackenbush v. Allstate Ins. Co.,*** 517 U.S. 706, 712 (1996). However, this Court has noted the importance of a party's right and ability to appeal decisions by district

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2. The situation here is analogous to the resubstitution order we found separable in ***Mitchell v. Carlson,*** 896 F.2d 128, 133 (5th Cir.1990), where an entity not otherwise subject to litigation was resubstituted as a party and thus became subjected to suit. ***Doleac ex rel. Doleac v. Michalson,*** 264 F.3d 470, 487 (5th Cir.2001). Appellants have become subjected to litigation since the district court determined they had no valid arbitration defense.

courts refusing to enforce arbitration under the Convention. ***Beiser v. Weyler,*** 284 F.3d 665, 673 (5th Cir.2002).

Here, Appellants argue that 9 U.S.C. § 16 provides direct appealability of the denial of arbitration. Section 16(a)(1)(A) clearly does provide for direct appeals from orders "refusing a stay of any action under section 3 of this title," and § 16(a)(1)(C) clearly allows for direct appeals from orders "denying an application under section 206 of this title to compel arbitration." 9 U.S.C.A. § 16(a) (West 2004). However, because the district court ultimately did not believe it had removal jurisdiction under the legislation adopting the Convention, 9 U.S.C. § 201 *et seq.*, its denial of Appellants' motion to compel arbitration could not have been under § 206 and likewise its denial of Appellants' motion to stay proceedings pending arbitration could not have been under § 3. Thus, this Court cannot rely on 9 U.S.C. § 16 itself for the order's appealability.[3]

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3. This Catch-22 problem cries out for immediate remedy from the Supreme Court in this case and, ultimately, from Congress for all comparable cases that are sure to follow. It seems entirely absurd—in light of the Supreme Court's and Congress's extremely clear intentions that arbitration properly subject to the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq.*, and the Convention be treated and interpreted favorably and that denials of arbitration properly subject to the FAA and the Convention be immediately appealable—(1) that a state could successfully legislate an end run to defeat preferred federal removal jurisdiction in cases where there can scarce be doubt that the arbitration agreement at issue falls under the auspices of the Convention and is validly invoked, and (2) that district courts could apply that state's law to ignore preemptive federal arbitration law.

Appendix A

1. Cohen exception to finality rule.

To determine whether a nonfinal order is appealable, the common analysis entails the approach first outlined in ***Cohen v. Beneficial Industrial Loan Corp.,*** 337 U.S. 541, 546-47 (1949), used to determine whether district court orders not appealable as final decisions under 28 U.S.C. § 1291 can nonetheless be reviewed as collateral orders. In ***Doleac*** this Court restated this four-step analysis: the decision (1) cannot be tentative, informal, or incomplete; (2) must deal with claims of right separable from, and collateral to, rights asserted in the action; (3) must be effectively unreviewable on the appeal from final judgment; and (4) must involve an issue too important to be denied review. 264 F.3d at 490-91 (citing ***Cohen,*** 337 U.S. at 546). Whether an order denying arbitration is appealable as a collateral exception to § 1291 is a *res nova* issue for this Court.[4]

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4. This Court has previously decided that district court decisions that favor or accommodate arbitration, such as orders compelling arbitration and grants of stays of legal proceedings pending arbitration, are not appealable under the ***Cohen v. Beneficial Industrial Loan Corp.,*** 337 U.S. 541 (1949), collateral order exception. ***West of England Ship Owners Mut. Ins. Assoc. (Luxembourg) v. Am. Marine Corp.,*** 981 F.2d 749, 751 (5th Cir.1993) (order compelling arbitration and staying litigation); ***Turboff v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,*** 867 F.2d 1518, 1520 n. 5 (5th Cir.1989) (same); ***Jolley v. Paine Webber Jackson & Curtis, Inc.,*** 864 F.2d 402, 404 (5th Cir.1989), *supplemented,* 867 F.2d 891 (5th Cir.1989) (order staying litigation). This Court has also previously decided that a district court order denying a stay of litigation, where pending litigation in the same district court concerned the question of arbitrability of a dispute, is

(Cont'd)

First, the denial of arbitration by the district court here was anything but tentative, informal, or incomplete. The determination that no valid arbitration clause existed due to Louisiana law and policy conclusively decided the disputed legal question of the validity of Appellants' arbitration defense.

Second, the denial of arbitration did not in any way affect, nor was it affected by, the underlying merits of Dahiya's Jones Act maritime action. The district court's denial of arbitration dealt solely with Appellants' separate right to assert arbitration as a defense, not with any right of Dahiya to recover on his negligence and unseaworthiness claims.

Third, as already discussed in Part I.A., because the state court could be bound by collateral estoppel on remand as to the district court's finding on the validity of Dahiya's arbitration agreement, the denial of arbitration would be effectively unreviewable on the appeal from final judgment.[5]

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not appealable as a ***Cohen*** collateral order. ***Rauscher Pierce Refsnes, Inc. v. Birenbaum,*** 860 F.2d 169, 171-72 (5th Cir.1988) (noting such decision was not effectively unreviewable because the final judgment of the declaratory judgment action could be appealed and set aside in favor of arbitration). However, these cases addressed entirely different questions than what this Court considers here, whether anti-arbitration decisions are appealable as collateral orders.

5. This is analogous to the situation presented in ***Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,*** 460 U.S. 1 (1983). There, plaintiff filed suit in state court seeking a declaratory judgment that there was no right to arbitration under the construction

(Cont'd)

Lastly, the denial of a party's right to enforce arbitration and thus not be subject to litigation in court is an issue too important to be denied appellate review. Congress expressed that very policy by enacting 9 U.S.C. § 16. *See* H.R.Rep. No. 100-889, at 36-37 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 5997.

Because in ***Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,*** 460 U.S. 1 (1983), the Supreme Court found a district court stay that effectively denied arbitration appealable within the *Cohen* exception to finality rule, the step to an outright denial of arbitration also constituting an exception to finality under § 1291 is small indeed. In fact, the Fourth Circuit made this exact step in ***Peoples Security Life Insurance Co. v. Monumental Life Insurance Co.,*** 867 F.2d 809, 812 (4th Cir.1989). I would take that same step and find the district court's denial of Appellants' motion to compel arbitration and stay proceedings pending arbitration appealable as a collateral order exception to § 1291.

(Cont'd)

contract with defendant. ***Id.*** at 7. Defendant then filed a diversity suit in federal district court, seeking an order compelling arbitration under § 4 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq.* ***Id.*** The district court stayed the federal case pending resolution of the state action. ***Id.*** The Supreme Court found the district court's refusal to decide the arbitration issue appealable under the *Cohen* exception to the finality rule. *Id.* at 11. "[T]his order would be entirely unreviewable if not appealed now. Once the state court decided the issue of arbitrability, the federal court would be bound to honor that determination as res judicata." ***Id.*** at 12.

Appendix A

2. *Interlocutory decision appealable per 28 U.S.C. § 1292.*

The ***Cohen*** collateral order exception is not the only means to achieve appellate review of the district court's denial of arbitration. *See* ***Peoples,*** 867 F.2d at 812 (easily conflating an order denying arbitration falling under the ***Cohen*** exception and also being appealable of right as an interlocutory decision refusing an injunction under § 1292(a)). Where a district court disfavors arbitration by staying arbitration proceedings pending outcome of litigation, this Court has found such stays appealable as interlocutory injunctions under § 1292(a)(1), which grants appealability over certain nonfinal interlocutory decisions. 28 U.S.C.A. § 1292(a)(1) (West 2004); ***Tai Ping Ins. Co., Ltd. v. M/V WARSCHAU,*** 731 F.2d 1141, 1143, 1146 (5th Cir.1984) (noting "only the most exceptional circumstances will justify any action . . . that serves to impede arbitration of an arbitrable dispute"); ***City of Meridian, Miss. v. Algernon Blair, Inc.,*** 721 F.2d 525, 529 (5th Cir.1983) (reversing injunction of arbitration where district court wrongly determined case was not arbitrable).

In ***Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co. (Pemex),*** 767 F.2d 1140 (5th Cir.1985), this Court determined that the Convention abrogated a longstanding rule of admiralty law that otherwise would have barred appeal of the district court's refusal to enforce an arbitration clause. ***Id.*** at 1147, 1149 (citation omitted). In finding the denial of arbitration appealable under 28 U.S.C. § 1292(a)(1) as an appeal from an interlocutory decision that refused injunctive relief, this Court reasoned that if the defendant's motion had

been granted instead of denied, the court's order would have required the plaintiff to participate in arbitration in a set location. *Id.* at **1149** ("Such an order would be, in effect, a mandatory injunction."). Therefore, even though it was not styled as such, the district court's order had "all the earmarks of a denial of injunctive relief under 28 U.S.C. § 1292." ***Id.*** In ***National Iranian Oil Co. v. Ashland Oil, Inc.,*** 817 F.2d 326 (5th Cir.1987), although the Convention did not apply because Iran was not a signatory and we did not mention *Sedco,* this Court likewise found that the district court's interlocutory order declining to compel arbitration and stay litigation was a denial of injunctive relief directly appealable under 28 U.S.C. § 1292(a)(1). *Id.* at 330.[6]

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6. While this Court decided ***National Iranian Oil v. Ashland Oil, Inc.,*** 817 F.2d 326 (5th Cir.1987), against the backdrop of the *Enelow-Ettelson* doctrine, ***Enelow v. New York Life Ins. Co.,*** 293 U.S. 379 (1935), *overruled in* ***Gulfstream Aerospace Corp. v. Mayacamas Corp.,*** 485 U.S. 271, 287 (1988), which had provided that an order granting or denying a stay of litigation where a party had set up an equitable defense to an action at law was, in effect, a an interlocutory injunction appealable under § 1292(a)(1), this does not foreclose us from finding that denials of arbitration are appealable as injunctions under § 1292(a)(1). The Supreme Court in ***Gulfstream*** stressed that § 1292(a)(1) would "continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have serious, perhaps irreparable, consequence." 485 U.S. at 287-88 (citations and internal quotes omitted).

In our cases following ***Gulfstream,*** we have denied § 1292(a)(1) review of district court decisions both denying and granting stays of litigation, but only where either the arbitration question was still

(Cont'd)

Appendix A

Title 9's section 16 on appeals was enacted by Congress in 1988 and amended in 1990. 9 U.S.C.A. § 16 note (West 2004). Thus, we decided ***Tai Ping, City of Meridian, Sedco,*** and ***National Iranian Oil*** against a backdrop where the FAA and the Convention did not specifically provide for immediate appeals of denials of arbitration (in admiralty or otherwise). *See also* ***Peoples,*** 867 F.2d at 812 (finding, also before § 16's enactment, that a district court's denial of arbitration and of a stay pending arbitration under an

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(Cont'd)
actively pending in the district court or where the arbitration question had already been decided in favor of arbitration. *See* ***Adams v. Georgia Gulf Corp.,*** 237 F.3d 538, 542 (5th Cir.2001) (stay denied after arbitrable dispute found under Convention); ***Jolley,*** 864 F.2d at 404 (stay granted pending arbitration), *supplemented,* 867 F.2d at 892 (finding nonreviewability of decision that granted stay pending arbitration consistent with proarbitration intent of Congress in then-numbered § 15 of the FAA); ***Rauscher,*** 860 F.2d at 169, 171 (stay denied where declaratory judgment action to determine arbitrability under the parties' contract was still pending in same district court, such that denying stay entailed no serious or potentially irreparable consequences and final judgment in declaratory judgment action could "be set aside on appeal in favor of arbitration").

Here, the district court has already clearly decided the arbitrability question in the negative against Appellants. Without immediate appellate review of the denial to compel arbitration and associated denial of stay of proceedings, Appellants face the serious consequence of being forced to litigate a dispute Dahiya already agreed to have submitted to arbitration. *See* ***City of Meridian, Miss. v. Algernon Blair, Inc.,*** 721 F.2d 525, 529 (5th Cir.1983) (noting how an injunction against arbitration causes irreparable harm due to the expense of litigation). The situation is also potentially irreparable because the state court on remand may be collaterally estopped from reviewing the validity of Dahiya's agreement to arbitrate

arbitration clause qualifying under the FAA was appealable of right under § 1292(a)); ***Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH,*** 585 F.2d 39, 42 n. 7 (3d Cir.1978) (noting same). There is nothing to indicate that these cases' common holding as to denials of arbitration being appealable as mandatory injunctions under § 1292(a)(1) has been abrogated; in fact, such a holding is entirely consistent with the proarbitration policy behind § 16.[7] *See* ***KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.,*** 184 F.3d 42, 47 (1st Cir.1999) (finding order staying pending arbitration immediately appealable as an injunction under both § 1292(a) and 9 U.S.C. § 16(a)(2)).[8]

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7. The proarbitration viewpoint of Congress, as it pertains to the appellate process, could not be clearer. The purpose of § 16, as indicated by its legislative history, is to provide for interlocutory appeals when a trial court rejects the contention that a dispute is arbitrable under an agreement of the parties and instead requires the parties to litigate. H.R.Rep. No. 100-889, at 36-37 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 5996-97 (discussing then-numbered § 15 of Title 9). In direct contrast, interlocutory appeals are specifically prohibited when the trial court finds that the parties have agreed to arbitrate the dispute. *Id.* at 37 (same).

8. However, § 16(b) provides that nonfinal orders that grant or favorably treat arbitration under the FAA or the Convention are not directly appealable except as provided by the certification process in § 1292(b). *See Cargill Ferrous Int'l v. SEA PHOENIX MV,* 325 F.3d 695, 697 (5th Cir.2003); *West of England,* 981 F.2d at 751 (disallowing appeal of order compelling arbitration and grant of stay of litigation pending arbitration under § 16(b)); *Turboff,* 867 F.2d at 1520 (disallowing same under then-numbered § 15 of the FAA); *Jolley,* 867 F.2d at 892 (supplementing prior decision and finding grant of stay pending arbitration not appealable under then-numbered § 15 of the FAA).

Appendix A

In ***Tejidos de Coamo, Inc. v. International Ladies' Garment Workers' Union,*** 22 F.3d 8, 10 (1st Cir.1994), even though the FAA expressly excludes employment contracts from its scope and so the labor dispute at issue was not properly subject to § 16, the First Circuit looked to the strong congressional policy in favor of immediate appeal of denials of arbitration that led to § 16's enactment. The First Circuit accepted the distinction based on proarbitration policy that decisions favoring arbitration are considered appealable injunctions under § 1292(a) while decisions disfavoring arbitration are not. ***Tejidos,*** 22 F.3d at 10-11. Accordingly, the First Circuit held that even where § 16 of the FAA is not formally applicable to a particular order staying arbitration, such order is immediately appealable as denial of an injunction under § 1292(a)(1). ***Id.*** at 11.

This Court has already agreed with the First Circuit that district court decisions favorable to arbitration, such as orders compelling arbitration and grants or denials of stays of legal proceedings pending arbitration of claims found arbitrable, are not appealable as injunctions under § 1292(a). ***Adams v. Georgia Gulf Corp.,*** 237 F.3d 538, 542 (5th Cir.2001); ***Jolley v. Paine Webber Jackson & Curtis, Inc.,*** 864 F.2d 402, 403-04 (5th Cir.1989), *supplemented,* 867 F.2d 891 (5th Cir.1989). This Court has also held that a denial of a stay pending arbitration, where the district court had not yet ruled on the arbitrability of the dispute, was not appealable under § 1292(a)(1). ***Rauscher Pierce Refsnes, Inc. v. Birenbaum,*** 860 F.2d 169, 171 (5th Cir.1988). However, post-***Tai Ping, City of Meridian, Sedco,*** and ***National Iranian Oil,*** and post-§ 16 enactment, we have not yet held that decisions ruling against arbitration, not formally subject to § 16, are otherwise

directly appealable as interlocutory injunctions under § 1292(a)(1).

Though the district court here determined that the arbitration clause in Dahiya's deed did not fall under the Convention due to its invalidity under Louisiana law, this does not change the fact that Appellants sought an injunction favoring the enforcement of arbitration, which the district court refused. As explained earlier, this denial entails serious and potentially irreparable effects. Therefore, I would find the reasoning and analysis of ***Tejidos*** persuasive. Thus, even though here direct appealability would not otherwise be formally available under § 16(a)(1)(A) or § 16(a)(1)(C) of the FAA and the Convention, the district court's refusal to grant Appellants' motion to compel arbitration and stay proceedings pending arbitration should be appealable as an interlocutory denial of an injunction under § 1292(a)(1).

II. *The district court erred in denying Appellants' motion to compel arbitration and stay proceedings.*

Because of what I feel to be the tremendous importance of the issues this case presents not only on the question of reviewability but also on the merits, I address those merits here. This Court reviews a district court's refusal to compel arbitration and stay litigation *de novo*. ***Cargill Ferrous Int'l v. SEA PHOENIX MV,*** 325 F.3d 695, 697 (5th Cir.2003). Likewise, the enforceability of a forum selection clause is a question of law that we review *de novo*. ***Haynsworth v. The Corporation,*** 121 F.3d 956, 961 (5th Cir.1997) (citation omitted).

Appendix A

A. Presumption of validity of forum selection clauses[9] under M/S BREMEN v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

The Supreme Court in ***The BREMEN*** found that forum selection clauses in international agreements "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. at 10. One way to show a clause unreasonable is if enforcement of the forum selection clause at issue "would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." ***Id.*** at 15. But the party resisting the clause must meet a "heavy burden of proof." ***Id.*** at 17.[10] Here, the district court agreed with Dahiya's contention that the forum selection clause in his employment deed is unreasonable under ***The BREMEN,*** and therefore unenforceable, because enforcement of Section II.8 of Dahiya's deed would violate strong public policy of Louisiana.

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9. The Supreme Court and the Fifth Circuit have explicitly declared "foreign arbitration clauses are but a subset of foreign forum selection clauses in general." ***Haynsworth v. The Corporation,*** 121 F.3d 956, 963 (5th Cir.1997) (quoting ***Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER,*** 515 U.S. 528, 534 (1995)).

10. The Supreme Court has enforced every forum selection clause in an international contract that has come before it. *See* ***M/V SKY REEFER,*** 515 U.S. 528, 540-42 (1995); ***Carnival Cruise Lines, Inc. v. Shute,*** 499 U.S. 585, 595 (1991); ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,*** 473 U.S. 614, 640 (1985); ***Scherk v. Alberto-Culver Co.,*** 417 U.S. 506, 519-20 (1974).

Appellants argue that Louisiana law is completely inapposite. However, this Court in ***Haynsworth,*** 121 F.3d at 965-69, has considered Texas public policy while affirming the enforceability of a forum selection clause in certain investors' agreements with a foreign underwriting exchange. The investors had argued, in part, that the clause was unreasonable per ***The BREMEN*** because it contravened Texas public policy as embodied in Texas securities laws and the Texas Deceptive Trade Practices Act ("DTPA"). There, we decided that the investors did not overcome the strong presumption of enforceability established by ***The BREMEN***. ***Haynsworth,*** 121 F.3d at 966-69. Dahiya claims that Louisiana public policy as expressed in La. R.S. § 23:921 overcomes the strong presumption of enforceability established by ***The BREMEN*** of the arbitration clause in his deed with Neptune.

There would appear to be two competing policy interests here. By enacting § 23:921, the Louisiana legislature has expressed its concern that in order for forum selection and choice of law clauses in employment contracts to be valid, employees must ratify them subsequent to the incidents giving rise to the claims. La. R.S. § 23:921A(2) (West 2004). The Louisiana Supreme Court, in ***Sawicki v. K/S STAVANGER PRINCE,*** 802 So.2d 598, 603 (La.2001), stated that the statutory requirement that employees agree to the forum (arbitration versus court, or choice of court) and the law to be applied after the fact of their injury or dispute occurs reflects Louisiana's strong public policy concerning forum selection clauses. *See also* ***Lim v. Offshore Specialty Fabricators, Inc.,*** No. Civ.A. 02-2126, 2003 WL 193518,

at *2 (E.D.La. Jan.28, 2003) (unpublished) ("Louisiana has expressed its hostility to forum selection clauses. . . .").[11]

However, the federal policy indicated by the Supreme Court in ***The BREMEN*** pulls in the opposite direction entirely. In ***The BREMEN,*** the ship at issue "was to traverse the waters of many jurisdictions. . . . That the accident occurred in the Gulf of Mexico and the barge was towed to Tampa in an emergency were mere fortuities." 407 U.S. at 13. The Court explained that the international contracting parties wanted to provide a neutral forum beforehand, so that there would be no question as to what would happen in case of a dispute. ***Id.*** This strong federal policy regarding the validity of pre-dispute selections of forum arises from "sensitivity to the need of the international commercial system for predictability in the resolution of disputes." ***Sedco,*** 767 F.2d at 1149 (citation omitted). This Court must also recognize the related, strong federal policy in favor of rigorously enforcing the specific forum choice of arbitration and arbitration awards, as reflected by Congress in enacting the FAA and the Convention. *See* ***Southland Corp. v.***

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11. ***Lim v. Offshore Specialty Fabricators, Inc.,*** No. Civ.A. 02-2126, 2003 WL 193518 (E.D.La. Jan.28, 2003) (unpublished), is currently awaiting disposition in this Court. I mention first, that the panel in *Lim* does not face the § 1447(d) remand bar to appellate jurisdiction to address the merits of the validity of the arbitration clause at issue there under the Convention, which the majority feels was encountered here; and second, that the merits questions in that case as to the application of ***M/S BREMEN v. Zapata Off-Shore Co.,*** 407 U.S. 1 (1972), and the preemption of Louisiana law hostile to arbitration by the FAA and the Convention are virtually identical to those in the instant case.

Keating, 465 U.S. 1, 10 (1984); ***Scherk v. Alberto-Culver Co.,*** 417 U.S. 506, 520 n.15 (1974).

Predictability in the resolution of disputes is precisely what Appellants desired and what Dahiya expressly agreed to in his deed here, and precisely what § 23:921 conflicts with and frustrates. If an accident or incident were to occur during and relating to Dahiya's training and employment under Neptune, notwithstanding in which body of water, Section II.8 of Dahiya's deed clearly anticipated the procedure to be followed—arbitration in either India or Singapore before a specific arbitrator who would apply Indian arbitration law. That this incident occurred in international waters near Louisiana and Dahiya received emergency treatment in Louisiana are "mere fortuities" because Dahiya and Neptune had already agreed to submit to arbitration elsewhere.

Section 23:921 works to presumptively void all arbitration clauses in employment contracts, no matter what their terms dictate. Not only does this policy directly conflict with ***The BREMEN***'s presumption of validity for forum selection clauses in general, but it conflicts with the proarbitration policy set out by Congress in the FAA and the Convention that similarly presumes arbitration provisions to be "valid, irrevocable, and enforceable." 9 U.S.C.A. § 2 (West 2004). The presumption of validity of arbitration clauses is also what another public policy of Louisiana heavily favors, as evidenced by its legislature's enactment of La. R.S. § 9:4201, which closely mirrors § 2 of the FAA. *See id.;* La. R.S. § 9:4201 (West 2004). Thus, Louisiana's general policy on arbitration is consistent with federal policy that

arbitration clauses should be considered presumptively valid. Given the relative weight of these competing policy concerns, I would find Dahiya has not met his heavy burden of showing that the forum selection clause in his deed is unreasonable, and the district court erred in concluding Dahiya had made such a showing.

B. Preemption of state statutes invalidating arbitration agreements.

In addition, any argument that the arbitration clause in Dahiya's deed is foreclosed by La. R.S. § 23:921 must be tried and tested by preemption analysis. Federal statutes enacted pursuant to the United States Constitution are the supreme law of the land. "[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." ***Gade v. Nat'l Solid Wastes Mgmt. Ass'n,*** 505 U.S. 88, 108 (1992) (citation omitted). Section 2 of the FAA, enacted by Congress pursuant to the Commerce Clause and incorporated by the Convention in 9 U.S.C. § 208, "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." ***Moses H. Cone,*** 460 U.S. at 24.

In ***Southland*** the Supreme Court held that the FAA preempts conflicting state law and concluded that even state courts cannot apply state statutes which invalidate arbitration agreements. 465 U.S. at 16.[12] The Court determined that the

12. The Supreme Court affirmed its decision regarding the FAA's preemption of state law in ***Mastrobuono v. Shearson Lehman Hutton, Inc.,*** 514 U.S. 52 (1995), and ***Allied-Bruce Terminix Cos., Inc. v. Dobson,*** 513 U.S. 265.

no-waiver provision of the California Franchise Investment Law, which required judicial consideration of claims brought under the law, *see* Cal. Corp.Code § 31512, directly conflicted with the FAA and violated the Supremacy Clause. ***Id.*** This Court has closely adhered to ***Southland*** in its decisions.

For example, in ***Commerce Park at DFW Freeport v. Mardian Construction Co.,*** 729 F.2d 334, 337 (5th Cir.1984), the real estate partnership plaintiff contended that the DTPA's no-waiver provision, *see* Tex. Bus. & Com.Code Ann. § 1742, precluded the resolution of DTPA claims by arbitration because it reserved such claims to a judicial forum. We noted that the broad arbitration clause in the franchise agreement in ***Southland*** was similar to that found in the construction contract between the parties in ***Commerce Park***. 729 F.2d at 337-38. Thus, we found ***Southland*** dispositive, and held that the no-waiver provision of the DTPA would abrogate § 2 of the FAA and thus violated the Supremacy Clause. ***Id.*** at 338.[13] Likewise, in ***OPE International LP v. Chet Morrison***

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13. *See also* ***Saturn Distrib. Corp. v. Paramount Saturn, Ltd.,*** 326 F.3d 684, 687 (5th Cir.2003) (noting under ***Southland Corp. v. Keating,*** 465 U.S. 1 (1984), that to extent Tex.Rev.Civ. Stat. Ann. art. 4413(36) §§ 1.02 and 3.01(a), now repealed, gave Texas Motor Vehicle Board exclusive jurisdiction over franchise disputes, statute would be preempted by the FAA because it limited availability of arbitration); ***Miller v. Public Storage Mgmt., Inc.,*** 121 F.3d 215, 219 (5th Cir.1997) (applying ***Southland*** and holding the FAA preempts conflicting state anti-arbitration laws); ***Ommani v. Doctor's Assocs., Inc.,*** 789 F.2d 298, 299-300 (5th Cir.1986) ("[T]o the extent that [the Texas Deceptive Trade Practices Act] provides a remedy parallel to and often overlapping claims that may fall within the scope of the Federal Arbitration Act, we find the *Southland* decision clearly apposite.").

Contractors, Inc., 258 F.3d 443, 447 (5th Cir.2001), this Court found that La. R.S. § 9:2779, which voided as against public policy any provision in certain construction contracts that required a suit or arbitration be brought outside Louisiana, was preempted by the FAA. There, because the Louisiana statute conditioned the enforceability of arbitration agreements on selection of a Louisiana forum, a requirement not applicable to contracts generally, we found § 9:2779 in direct conflict with § 2 of the FAA. ***OPE Int'l,*** 258 F.3d at 447.

The Convention was negotiated in 1958 and entered into by the United States in 1970 pursuant to the Constitution's Treaty power. 9 U.S.C.A. § 201 note (West 2004). That same year Congress adopted enabling legislation, 9 U.S.C. § 201 *et seq.,* to make the Convention "the highest law of the land." ***Id.***; ***Sedco,*** 767 F.2d at 1145. As a ratified international treaty, the Convention, with its incorporated FAA provisions, also preempts any state law which would invalidate arbitration agreements.[14]

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14. Where there is a conflict between a treaty and the provisions of a state constitution or of a state statute, the treaty will control. ***Zschernig v. Miller,*** 389 U.S. 429, 440-41 (1968); ***Clark v. Allen,*** 331 U.S. 503, 508 (1947); *see, e.g.,* ***David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London),*** 923 F.2d 245, 250 (2d Cir.1991) (finding the FAA and the Convention preempted a Vermont statute that required any agreement to arbitrate be displayed prominently in the contract or contract confirmation and be signed by the parties); ***F.A. Richard & Assocs., Inc. v. Gen. Marine Catering Co., Inc.,*** 688 So.2d 199, 201-02 (La.Ct.App.1997) (finding the Convention preempted La. R.S. § 22:629 that prohibited enforcement of insurance contract provisions which would divest Louisiana courts of jurisdiction over insurance actions).

Here, the Louisiana statute cited by Dahiya and relied on by the district court, La. R.S. § 23:921, presumptively voids any choice of forum or choice of law clause in any employment contract unless expressly ratified by the employee after the occurrence of the subject of the action. This *ex post facto* approval requirement directly conflicts with § 2 of the FAA, which presumes written provisions for arbitration to be "***valid, irrevocable, and enforceable,*** save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2 (West 2004) (emphasis added).

By enacting § 2 of the FAA, incorporated by the Convention in 9 U.S.C. § 208, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." ***Doctor's Assocs., Inc. v. Casarotto,*** 517 U.S. 681, 687 (1996) (finding a Montana statute that voided arbitration clauses unless they were typed in underlined capital letters to be preempted by the FAA) (internal quotations and citations omitted).

Therefore, because § 23:921 targets forum selection clauses in employment contracts and regards them as suspect, I would find § 23:921 preempted by both the FAA and the Convention, at least as applied to employment agreements containing arbitration clauses. Thus, I would hold the district court erred by concluding § 23:921 invalidated the arbitration clause in Dahiya's deed.

C. *The arbitration clause in Dahiya's deed and the Convention.*

It is clear that both Congress, in enacting the FAA and the Convention, and the Supreme Court, in interpreting their application to arbitration agreements, have expressed a liberal federal policy favoring the enforcement of arbitration provisions. *See* ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,*** 473 U.S. 614, 625 (1985) (citation omitted). This strong presumption in favor of arbitration "applies with special force in the field of international commerce." ***Id.*** at 631. In light of the strong federal policy favoring arbitration, courts are to conduct a "very limited inquiry" when deciding whether to compel arbitration pursuant to the Convention. ***Francisco v. STOLT ACHIEVEMENT MT,*** 293 F.3d 270, 273 (5th Cir.2002) (citation omitted).

Thus, this Court has outlined a simple four-step analysis for courts to perform: whether "(1) there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen." *Id.* (citing ***Sedco,*** 767 F.2d at 1144-45). Once an arbitration agreement is found to fall under the Convention, the district court is authorized by 9 U.S.C. § 206 to order arbitration pursuant to the parties' agreement, within or outside the United States. In fact, the Convention mandates that courts order arbitration. ***Francisco,*** 293 F.3d at 273 (citation omitted); *see also* ***Sedco,*** 767 F.2d at 1145, 1151 ("9 U.S.C. § 206 does not confer discretion in compelling arbitration."). I would find that Dahiya's

arbitration clause easily meets all four requirements of the Convention and that the district court erred in not compelling arbitration and staying the proceedings per Appellants' motion.

For the Convention to apply, there must be an agreement in writing to arbitrate the dispute. ***Francisco,*** 293 F.3d at 273. This Circuit has already decided in ***Sphere Drake Insurance PLC v. Marine Towing, Inc.,*** 16 F.3d 666, 669 (5th Cir.1994), that the Convention's definition of "agreement in writing" includes "either (1) an arbitral clause in a contract or (2) an arbitration agreement, (a) signed by the parties or (b) contained in an exchange of letters or telegrams." The signature or exchange of letters qualification only applies to arbitration agreements, not arbitration clauses found within contracts. ***Id.;*** *see also* ***Francisco,*** 293 F.3d at 273 (determining that a Filipino seaman who had signed an employment contract containing an arbitration clause was enough to constitute an agreement in writing to arbitrate the dispute per the Convention).

Here, seaman Dahiya signed a deed covering his 12 months of practical training at-sea, which time would be applied to his three-year Diploma in Maritime Studies. He also agreed in the deed to serve as an employee to Neptune or a company of Neptune's choosing for a bonded period of two years after receiving his degree and passing his Class V exam. Though Dahiya is correct in saying that Neptune did not explicitly sign the deed, Section I.16 of the deed specifies that the company—Neptune—"covenants on its part to cause the Engine Cadet to be trained in the business of Marine Engineering and duties of an Engine Cadet onboard the

company's ships and provide the Cadet with sufficient board[.]" Section I.17 outlined how much Neptune would pay Dahiya as "wages" for the two years remaining before receiving his degree—the first consisting of his at-sea training and the second year consisting of his attendance of classes at the National Maritime Academy in Singapore. Because both sides exchanged promises in the deed, it functioned as an employment contract.[15]

Like the seaman in ***Francisco,*** Dahiya signed an employment deed that contained an express arbitration clause. Section II.8 of Dahiya's deed provided:

> Any dispute arising out of this Agreement shall be subject to Arbitration under the Arbitration and Conciliation Act, 1996. The said proceedings shall take place either in Singapore or in India at the option of the Company. Capt. Karanjit Singh, A 64/3, SFS Flats, Saket, New Delhi, shall be appointed as the arbitrator in these proceedings.

This deed was, as in ***Sphere Drake*** and ***Francisco,*** a contract between Neptune and Dahiya that indisputably contained an arbitral provision whereby "[a]ny dispute arising from [Dahiya's deed] shall be subject to Arbitration." Thus, no

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15. In its October 11, 2002, Order and Reasons, the district court stated: "Dahiya signed an employment contract before starting work on the EAGLE AUSTIN." Dahiya's deposition testimony also indicates that he understood the deed document he signed to govern his employment aboard the EAGLE AUSTIN and that Neptune was his employer.

signature was required; the arbitration clause found within Dahiya's deed constitutes an agreement in writing under the Convention.[16]

Dahiya also argues that this tort suit is not a dispute covered by the scope of the arbitration clause.[17] He alleged in his original petition that at the time of his injuries, "[o]n or about November 13, 1999, [Dahiya] was serving aboard the M.T. EAGLE AUSTIN as an Assistant Engineer in the employ of defendants." The deed's arbitration clause, Section II.8, clearly provided for arbitration for "[a]ny dispute arising out of this Agreement" without limitation. Thus, as we outlined in ***Francisco,*** 293 F.3d at 278, although Dahiya's deed allowed a remedy for work-related personal injuries, the similarly broad language of Section II.8 covers this tort dispute arising from injuries Dahiya sustained on the EAGLE AUSTIN during his on-board training pursuant to his employment "Agreement." Accordingly, I would find the first requirement met.

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16. I do not pursue a discussion of Dahiya's remaining defense to arbitration, that nonsignatories of an agreement cannot compel arbitration. Suffice to say, this defense fails entirely as to Neptune, *see* ***Sphere Drake Insurance PLC v. Marine Towing, Inc.,*** 16 F.3d 666, 669- 70 (5th Cir.1994), because Neptune was a party to Dahiya's employment contract containing the arbitration clause. However, should Dahiya be able to show that the rest of Appellants do not meet either requirement under ***Westmoreland v. Sadoux,*** 299 F.3d 462, 467 (5th Cir.2002), allowing nonparties to an agreement to compel arbitration, Dahiya's defense as to them would succeed.

17. Generally, whenever the scope of an arbitration clause is in question, courts are to construe the clause in favor of arbitration. *See* ***Mitsubishi,*** 473 U.S. at 626.

The second requirement for the Convention to apply is that the agreement must provide for arbitration in the territory of a Convention signatory. ***Francisco,*** 293 F.3d at 273. Dahiya's deed explicitly provides for arbitration, which clause (as explained above) the district court erroneously found to be invalid. As for the location of such arbitration, the clause provides for arbitration proceedings to take place in either India or Singapore. In 1960, India acceded to the Convention; in 1986, Singapore acceded to the Convention. 9 U.S.C.A. § 201 note (West 2004). Therefore, I would find the second requirement met.

The third requirement for the Convention to apply is that the agreement arises out of a commercial legal relationship. ***Francisco,*** 293 F.3d at 273. After detailed analysis in ***Francisco,*** this Court held seaman employment contracts to be commercial legal relationships covered by the Convention, even though they are excepted by the FAA. ***Id.*** at 274-75. Therefore, I would find the third requirement met.

The final requirement for the Convention to apply is that there must be a party to the agreement who is not an American citizen. ***Id.*** at 273. It is clear that Dahiya himself is not an American citizen but an Indian citizen. Further, the other party to the deed, Neptune, is not an American corporation but a Singapore corporation. Thus, I would find the fourth requirement met.

All four requirements having been met here, I would find the arbitration agreement in Dahiya's deed satisfies the very limited, "low bar" inquiry Congress intended courts to apply when determining whether arbitration agreements fall under

the Convention. *See* ***Beiser,*** 284 F.3d at 674 ("[E]asy removal is exactly what Congress intended in § 205."). The district court clearly erred when it refused to compel arbitration and stay proceedings under the Convention per Appellants' motion.

APPENDIX B — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA FILED OCTOBER 11, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NO. 02-2135

SECTION "F"

VINOD KUMAR DAHIYA

VERSUS

TALMIDGE INTERNATIONAL, LTD., ET AL.

ORDER AND REASONS

Before the Court is plaintiff's Motion to Remand and defendants' Motion to Compel Arbitration and Stay, or, Alternatively, to Dismiss. For the reasons that follow, the plaintiff's motion is GRANTED and the defendants' motion is DENIED.

Background

The plaintiff, Vinod Kumar Dahiya, an Indian national, was a crew member on the M/T EAGLE AUSTIN pursuant to an employment agreement with defendant Neptune Shipmanagement Services. The EAGLE AUSTIN is registered in Singapore. Plaintiff was injured on November 13, 1999 while operating the vessel's incinerator. He received medical treatment in Louisiana, and has since returned to India.

Appendix B

Dahiya signed an employment contract before starting work on the EAGLE AUSTIN. The contract provides:

> Any dispute arising out of this Agreement shall be subject to Arbitration under the Arbitration and Conciliation Act, 1996. The said proceedings shall take place either in Singapore or in India at the option of the Company.

On March 4, 2002, Dahiya sued Neptune and four others in Louisiana state court for damages under the Saving to Suitors clause, 28 U.S.C. § 1333(1). Defendants removed the case to federal court. However, they did not file the removal notice within thirty days of plaintiff's initial pleading. Plaintiff now moves to remand to state court, and defendants move to compel arbitration or, in the alternative, to dismiss.

I. *Validity of the Forum Selection Clause in Dahiya's Contract*

The Court begins with an analysis of the contract's forum selection clause. The Supreme Court, in *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), affirmed that forum selection clauses in international agreements are presumptively valid. This presumption of validity may be overcome, however, by a clear showing that the clause is "unreasonable under the circumstances." *THE BREMEN*, 407 U.S. at 10.

A forum selection clause is unreasonable if: (1) the incorporation of the clause into the agreement was the product

of fraud or overreaching; (2) the party seeking to escape enforcement "will for all practical purposes be deprived of his day in court" because of the grave inconvenience of unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the clause would contravene a strong public policy of the forum state. *Haynsworth v.. Lloyd's of London,* 121 F.3d 956, 963 (5th Cir.1998) (citing *THE BREMEN,* 407 U.S. at 12-13).

Plaintiff contends that the contract's forum selection clause is invalid because its enforcement would violate a strong public policy in Louisiana. A state's strong public policy can be "declared by statute or by judicial decision." *THE BREMEN,* 407 U.S. at 15. Louisiana's strong public policy against forum selection clauses in employment contracts is evident by both statute and the Louisiana Supreme Court. La.R.S. § 23:921(A)(2) states:

> The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause or choice of law clause in an employee's contract of employment or collective bargaining agreement, or attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void *except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the*

> *incident* which is the subject of the civil or administrative action. (Emphasis added).

Moreover, the Louisiana Supreme Court has held that La. R.S. § 23:921 invalidated the forum selection clause of a Polish seaman's employment contract. The high court wrote:

> [T]he United States Supreme Court in [*THE BREMEN*] held that forum selection clauses will be upheld unless they contravene a strong public policy of the forum in which the suit is brought. La.Rev.Stat. 23:921(A)(2) is an expression of strong Louisiana public policy concerning forum selection clauses.

Sawicki v. K/S STAVANGER PRINCE, 802 So.2d 598, 603 (La.2002).

This Court finds that the unequivocal language of both La.R.S. § 23:921 and the Louisiana Supreme Court demonstrate that employment contract forum selection clauses contravene strong Louisiana public policy. The record is silent on the issue of plaintiff's ratification and plaintiff has specifically denied any form of ratification occurred.

II. *Removal Under 9 U.S.C. § 205*

"Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." 28 U.S.C. § 1441(b). Under § 203 of the

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, "[a]n action or proceeding failing under the Convention shall be deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203.

While defendants' failure to file a notice of removal within thirty days of plaintiff's initial pleadings waives most of their subject matter jurisdiction claims, § 205 of the Convention permits removal at any time before trial. § 205 states:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.

9 U.S.C. § 205.

An agreement to arbitrate exists within the meaning of § 205 if: (1) there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen. *See Francisco v. STOLT ACHIEVMENT MT,* 293 F.3d 270, 273 (5th Cir.2002); *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping,* 241 F.3d 135, 146 (2d Cir.2001).

Appendix B

The Court finds that Dahiya's employment contract fails to satisfy the second element of an "arbitration agreement" under § 205. The forum selection clause in Dahiya's employment contract states that arbitration shall occur in either Singapore or India. While it is undisputed that both countries are signatories to the Convention, the forum selection clause is invalid because it contravenes Louisiana express public policy. Therefore, the employment contract does not provide for arbitration in the territory of a Convention signatory, and the Court finds that no arbitration agreement exists to justify removal under § 205.[1]

Accordingly,

The plaintiff's Motion to Remand is GRANTED. Thus, defendants' Motion to Compel Arbitration and Stay, or, Alternatively, to Dismiss is DENIED.

s/ Martin C. Feldman
MARTIN C. FELDMAN
UNITED STATES DISTRICT JUDGE

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1. In *Francisco,* the Fifth Circuit held that the Convention governed an employment contract containing arbitration and forum selection agreements nearly indistinguishable from those in Dahiya's contract. *See id.* at 278. The *Francisco* plaintiffs, however, did not assert that Louisiana's public policy contravened forum selection clauses in employment contracts. Thus, *Francisco* is not controlling.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 27, 2004

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-31068

VINOD KUMAR DAHIYA,

Plaintiff-Appellee,

v.

TALMIDGE INTERNATIONAL LTD; NEPTUNE SHIPMANAGEMENT SERVICES (PTE.) LTD; AMERICAN EAGLE TANKERS INC. LTD; AMERICAN EAGLE TANKERS AGENCIES INC.; BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LTD,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC

(Opinion 5/18/04, 5th Cir., ____, ____ F.3d ____)

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

Appendix C

PER CURIAM:

Treating the Petition for Rehearing En Banc as Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

Appendix C

DeMOSS, Dissenting from Refusal to Reconsider En Banc, joined by Judge Smith.

For the following reasons, I respectfully dissent from the refusal of our Court to reconsider en banc the panel decision in this case:

1. The agreement to arbitrate at issue in this case was entered into in writing between Dahiya, a citizen of the country of India, and Neptune Shipmanagement Services (PTE) Ltd. ("Neptune"), his employer, a corporate entity organized under the laws of the country of Singapore. Both the country of India and the country of Singapore are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention").

2. The United States of America is a signatory to the Convention, and Congress enacted special statutory provisions, 9 U.S.C. § 201 *et seq.* (the "Act"), to provide for the enforcement of the Convention within the United States. As an act enabling a treaty, the Act comprises "the highest law of the land."

3. The State of Louisiana is not a signatory to the Convention, and whatever its statutory or decisional law may indicate to be its public policy either favoring or disfavoring agreements to arbitrate, that policy is irrelevant and immaterial to the application and enforcement of the Act.

4. The district court clearly erred in considering that the statutory and decisional law of Louisiana invalidated the agreement to arbitrate between Dahiya and his employer Neptune and clearly erred again in determining that the suit which Dahiya filed against his employer in state court in Louisiana did not relate to the arbitration agreement between them and that removal to federal court under § 205 was not proper.

5. The district court erred in not granting the motion of Dahiya's employer Neptune to compel arbitration under § 206 of the Act and such error was immediately appealable under the provisions of 9 U.S.C. § 16(a)(1)(C) of the Federal Arbitration Act (the "FAA"), incorporated into the Act by § 208.

6. The district court erred in granting the motion to remand the controversy between Dahiya and his employer Neptune to state court.

7. The Fifth Circuit panel erred in determining that the district court's order to remand was entered in accordance with the provisions of 28 U.S.C. § 1447 (c) and that consequently the panel did not have appellate jurisdiction under § 1447(d).

The net result of the foregoing errors is to frustrate the intention of Congress as reflected by the FAA and the Act to give foreign parties the right to choose arbitration as a form of dispute resolution designed to save the parties time, money, and effort by substituting for the litigation process the

advantages of speed, simplicity, and economy associated with arbitration. If the provisions of § 1447(d) will always trump the provisions of 9 U.S.C. § 16, then the Convention will be unenforceable in the State of Louisiana and the procedural pattern utilized by Dahiya's counsel in this case will become a pattern for subjecting foreign defendants to litigation in Louisiana state court with personal injury claimants with whom agreements to arbitrate had in fact been made. I am disappointed that my colleagues on this Court seem to conclude that two wrongs make a right and that Congress's elaborate efforts in Title 9 to give parties the right to choose arbitration in place of litigation can now be frustrated by the age-old controversy as to whether litigation was going to occur in the state courts or the federal courts.